FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3408/2010

In the matter between:

VOLTEX (PTY) LTD t/a LITECOR BLOEMFONTEIN	Plaintiff
and	
R DU RANDT N.O. (in his capacity as Trustee of the **STORAGE CONCEPTS TRUST, IT 393/2003)**	First Defendant
W J DU RANDT N.O. (in his capacity as Trustee of the **STORAGE CONCEPTS TRUST, IT 393/2003)**	Second Defendant
CALVIN DU RANDT	Third Defendant

HEARD ON: 24 & 25 JULY 2012

JUDGMENT: LEKALE, J

DELIVERED ON: 10 AUGUST 2012

INTRODUCTION AND BACKGROUND

[1] This is a claim for payment of R53 549,92 for goods allegedly sold and delivered to defendants in their representative capacities as trustees by the plaintiff.

[2] The plaintiff is a registered private company which sells and distributes electrical products.

[3] The first and second defendants are cited in their respective capacities as the trustees of the Storage Concepts Trust with registration number IT 393/2003 (the Trust).

[4] The third defendant is cited both in his capacity as a trustee of the Trust and personal capacity as surety and co-principal debtor *in solidum* with the Trust.

[5] During October 2007 the plaintiff and the Trust concluded a Credit Facilities Agreement in terms of which they, *inter alia*, agreed that:

5.1 the plaintiff grants the Trust a credit limit of R100 000,00;

5.2 the purchase price shall be payable by the Trust within 30 days of the date of statement unless agreed otherwise;

5.3 a certificate of balance signed by the plaintiff's secretary/manager or any director/member reflecting the amount owing by the Trust and the fact that that amount is due, owing and unpaid shall be *prima facie* proof of the effects therein stated for the purpose of, *inter alia*, any action and that it shall rest, entirely, with the Trust to prove that such amount is not owing, due and/or unpaid;

5.4 the third defendant bound himself as surety for and co-principal debtor *in solidum* with the Trust in favour of the plaintiff for payment of any amounts owing to the plaintiff by the Trust;

5.5 the Trust agreed to pay all legal costs incurred by plaintiff in any action against the Trust in any competent court inclusive of costs on an attorney and own client scale.

[6] On the 1st September 2009 Lifes' Comfort Solutions (LCS), a Lesotho based client of the Trust, placed an urgent order for a large consignment of lights and accompanying electrical installation with the plaintiff.

[7] LCS, however, did not have a credit facility with the plaintiff to facilitate the speedy processing of that order. It, therefore, approached the Trust for assistance and the latter allowed it to

utilise its account with the plaintiff for that purpose and, further, proceeded to apply for an increase in its credit limit with the plaintiff to accommodate the order in question.

[8] The plaintiff, eventually, effected deliveries in Lesotho at LCS's premises and submitted invoices to the Trust for payment.

[9] The invoices submitted, however, did not reflect the Trust's VAT number and some stock had to be returned because it was not utilised.

[10] The plaintiff, eventually, collected the surplus stock from LCS in Lesotho and agreed to credit the Trust accordingly and to return some of the stock to the supplier (Radiant) subject to the latter's return rules.

[11] Radiant agreed to accept returns with a 15% handling fee except for some specified items of stock.

[12] Plaintiff furnished the Trust with a sales analysis report

reflecting, *inter alia*, invoice numbers and the stock to be returned to it and to Radiant.

[13] On the 28th February 2010 the plaintiff reflected the balance owing on the Trust's account as being R332 382,42.

[14] On the 31st March 2010 the plaintiff recorded a receipt of R212 411,08 and R12 572,49 from the Trust and reflected a balance of R107 398,85 on the opening balance of R332 382,42.

[15] On the 27th May 2010 the plaintiff signed off eight credit notes in favour of the Trust leaving the balance of R53 549,92 for which it, eventually, issued summons against the defendants.

[16] The defendants resist the claim on the grounds that the Trust remitted an amount of R212 411,08 on the 31st March 2010 in full and final settlement of the amount due and payable to the exclusion of the VAT amount and the purchase prices of all the stock returned as advised by the plaintiff.

ISSUES IN DISPUTE

[17] In the pre-trial minute the parties, effectively, limited the issue to be determined to the question whether or not the Trust is indebted to the plaintiff in the amount of R53 549,92 in respect of goods sold and delivered by the plaintiff at the Trust's special instance and request.

[18] In argument the defendants contend that available evidence does not sustain the assertions made in the summons in that no contractual relationship has been established between the Trust and the plaintiff.

PLAINTIFF'S CASE

[19] **Chantell Human** testified to, *inter alia*, the effect that she received the order from LCS but could not process the same because the latter did not have an account with the plaintiff. She gave LCS three payment options including the possibility of using the account of an existing client of the plaintiff. She, eventually, received an electronic mail from LCS to the effect that the third defendant had agreed that the Trust's account

may be used for the relevant order. The third defendant, on his part, confirmed the authorisation and placed the order telephonically. The Trust, eventually, applied for an increase in its credit limit with the plaintiff in order to accommodate the relevant order. She did not handle accounts and the lady responsible for the same initially omitted to reflect the Trust's VAT registration number on the tax invoices issued. She went to Lesotho to collect surplus stock and identified what was to be credited to the Trust's account. The Trust never queried the deliveries which were made in Lesotho and the third defendant only raised the issue concerning the absence of the Trust's VAT number on tax invoices. The Trust account had a debit balance when the order was placed.

[20] **Petrus Johannes Potgieter** testified to the effect that he is the plaintiff's Regional Manager. He, further, confirmed that the certificate of balance contained in exhibit "D" as document number 16 was prepared by the plaintiff's Legal General Manager. Exhibit "E" is the original certificate of balance. He does not know the relevant account as he was not at the

Bloemfontein branch at the relevant time.

DEFENDANTS' VERSION

[21] **Calvin du Randt** testified to, *inter alia*, the effect that the Trust was handling the project in question in Lesotho. The Trust gave permission to LCS to use its account for the project in question. The buyer was LCS while the Trust's role was limited to being a middle man. The stock was delivered in Lesotho and directly to LCS by the plaintiff. After the plaintiff had indicated the items to be taken back as set out in pages 50 to and including 52 of exhibit "C", he secured the assistance of his auditor to determine the amount owing and payable to the plaintiff. In so doing he deducted the value of the items identified as being returnable as well as the VAT amount. The Trust could not pay the VAT amount because it would not have been able to claim input tax due to the absence of its VAT registration number on the invoices. He came to the total of R212 411,08 which the Trust paid as per page 54 of exhibit "C". According to him the value of returnable goods was R86 238,22. The Trust did not place an order with the plaintiff nor

did it receive any stock from the plaintiff.

CONTENTIONS BY THE PARTIES

[22] In argument Ms De Kock, for the plaintiff, submits, *inter alia*, that the certificate of balance, as agreed between the Trust and the plaintiff, constitutes *prima facie* evidence which required the Trust to answer upon the mere production of the certificate. It is not sufficient, in law, for the defendant to cast suspicion on the correctness of the facts established by the said certificate. In her view, the defendants' attack upon the certificate must be based on some substantial foundation. The contractual relationship exists only between the plaintiff and the defendant and not between the plaintiff and LCS.

[23] Mr Benade, for the defendants, submits that there exists no contractual relationship between the plaintiff and the Trust because no delegation took place as the contract between the Trust and LCS was a mandate to pay. According to him in any event the amount due and payable was paid in full by the Trust.

APPLICABLE LAW

[24] The parties are *ad idem* that a certificate of balance constitutes *prima facie* evidence of the balance owing. Such evidence can still be disturbed by adducing evidence to the contrary. If at the end of the case, the *prima facie* evidence of the certificate is unaffected by other evidence, such evidence becomes conclusive proof of the balance owing. (See **SENEKAL v TRUST BANK OF AFRICA LTD** 1978 (3) SA 375 (A) and **SOLOMON NO AND OTHERS v SPUR COOL CORPORATION (PTY) LTD AND OTHERS** 2002 (5) SA 214 (CPD) at 273 G – H.)

[25] Delegation, as a form of novation, consists of an agreement among all the parties concerned in terms of which a third party is introduced as a debtor in substitution for the original debtor who is discharged. It requires, for its conclusion, that the "creditor, the original debtor and the debtor proposed in his place... to be parties". (See **VAN ACHTERBERG v WALTERS** 1950 (3) SA 734 (T) at 745 D – E.)

[26] A mandate to pay arises when the debtor requests a third party to pay his creditor with the result that the debtor remains liable and there exists no contractual relationship between the creditor and the third party. (See Christie's: **THE LAW OF CONTRACT IN SOUTH AFRICA**, 6th Edition, Lexis Nexis, p 480.)

[27] A contract of sale arises when the parties agree on the thing to be sold (*merx*) and the price (*pretium*) to be paid therefor. (See **DHARUMPAL TRANSPORT (PTY) LTD v DHARUMPAL** 1956 (1) SA 700 (A) at 707 C.)

[28] No deduction of input tax can be allowed in respect of a taxable supply unless a valid tax invoice issued in relation to that supply is held by the vendor seeking to make such a deduction at the time when a return in respect of that supply is furnished. (See section 16(2) of Value Added Tax Act 89 of 1991 (VAT Act).)

[29] A valid full tax invoice reflects, *inter alia*, the particulars of the recipient of a taxable supply as well as his VAT registration

number if he is a registered vendor. (See section 20(4) of VAT Act.)

[30] An abridged tax invoice may not contain the particulars of the recipient of the taxable supply and can only be issued if the consideration paid for the supply is less than R3 000,00. (See section 20(5) of VAT Act.)

FINDINGS AND APPLICATION OF THE LAW

[31] It is clear from applicable law that delegation, as a form of novation, is essentially transfer of a pre-existing debt to a third party as a new debtor. It follows, therefore, that in the present case there should have existed a sale agreement, giving rise to a debt, between the plaintiff and LCS for a delegation saddling the Trust with a contractual liability to ensue.

[32] Ms De Kock argues against the existence of such a sale agreement. Mr Benade, on his part, maintains that such an agreement existed, but holds that a mandate to pay and not a delegation ensued thereafter between LCS and the Trust.

[33] I am persuaded by available evidence that a sale agreement was concluded between the plaintiff and LCS when the latter, represented by its Chief Executive Officer (CEO), secured a quotation from the plaintiff and placed an order, which was accepted, in terms thereof. The parties agreed on the *merx* and the price. The only outstanding issue was how the price was to be paid. That issue is not an essential element of a sale agreement. The fact that LCS was given three options as to the method of payment is inconsequential on the validity of the sale contract.

[34] I am, further, satisfied that a delegation eventuated when the Trust, through the third defendant, agreed to both LCS's CEO and the plaintiff that the order placed by LCS may be processed on its account. In this regard it should be noted that the distinguishing feature of a mandate to pay is that the contractual relationship is between the debtor and a third party and no privity of contract arises between the creditor and the third party. The third party pays for the account of and on behalf of the debtor whereas, in the present matter, the debits

were for the account of the Trust.

[35] The next question is whether or not the defendants' attack upon the certificate has affected the certificate such that the *prima facie* evidence afforded by it has been displaced to the extent that it cannot be said to have become sufficient proof of the extent of the liability of the Trust.

[36] The defendants' case, through the mouth of the third defendant as a witness, is that the balance which was lawfully owing was paid insofar as it was not obliged, in law and fairness, to pay VAT amounts on the basis of invalid tax invoices and that certain items were identified as returnable.

[37] I must hasten to mention, en passant, that it did not behove the Trust to calculate the balance owing on the basis of unconfirmed facts. As correctly submitted for the plaintiff, the notes on p 50 of exhibit "C" were to, *inter alia*, the effect that items were to be returned and Radiant still had to advise on the matter. The correct and reliable information on the amounts

payable would only have been ascertained after, *inter alia*, Radiant, as the supplier, had accepted the returns and charged its handling fees where applicable.

[38] The parties are, effectively, in agreement that the plaintiff's case with regard to how the balance claimed is made up is as reflected on p 1 of exhibit "E". A scrutiny of the invoices listed therein reveals that only two of the invoices involved were identified as returnable to Radiant. The rest of the invoices were, thus, indicated as being payable by the Trust without reservation.

[39] The defendants' case is effectively that the invoices in question have been paid. In this regard Mr Benade, effectively, submits that the relevant invoices were included in the total amount from which the VAT amounts and the value of the returns were deducted when the Trust came up with the amount which it paid.

[40] In this regard the parties are in dispute over whether or not the

Trust was entitled to make the said deductions before credit notes had been passed by the plaintiff in its favour.

[41] As Ms De Kock correctly contends for the plaintiff, credit notes were only issued on the 3rd May 2010 after the Trust had paid the R212 411,08 on the 31st March 2010. Chantell Human's evidence and entries in the relevant customer sales analysis clearly indicate that the returns were yet to be made and the supplier's advice was yet to be secured. In my view, the certificate of balance herein also serves as an advice on the amount owing after the credit notes had been passed.

[42] Radiant, the supplier, agreed to accept returned stock for credit with a 15% handling fee excluding some faulty BG 16. The only BG 16 apparent on p 51 of exhibit "C" relates to invoice number 9975389 for R17 387,70. This invoice is part of the invoices in respect of which summons was issued. The Trust's case, as per third defendant's testimony, is effectively that that invoice was not paid insofar as he testified that he deducted the value of all stock indicated by Chantell Human as returnable.

The fundamental difference between the calculations of the parties herein appear to stem from the total balance from which payment of R212 411,08 was deducted when it was made on the 31st March 2010. Where the plaintiff works from R332 382,42 the Trust's point of departure appears to be R298 649,30. It is not clear how the Trust came to that balance because page 50 of exhibit "C" reflects R298 884,60.

[43] Invoice number 9976294, which is also included in the list of invoices which form the basis of the amount being claimed by the plaintiff, was also indicated as being returnable subject to Radiant's advice. On the 3rd May 2010 the plaintiff passed eight credit notes against some 20 invoices in respect of items which were indicated as being returnable.

[44] It is, therefore, probable, in my view, that the certificate of balance is correct in respect of the invoices payable. The defendants' evidence does not affect the certificate of balance in that respect.

[45] The next enquiry is whether or not the Trust is obliged to pay VAT on the relevant invoices. Ms De Kock correctly concedes that invoices which do not contain the Trust's VAT registration number are, in law, invalid. She, however, correctly submits that such particulars may not be furnished in respect of a cash consideration which is less than R3 000,00. In this regard she concludes that R6 286,89 may be deducted in respect of the VAT charged on the relevant invoices. It is, however, possible that the total balance from which the plaintiff worked when the Trust effected payment, includes other considerations in respect of which full tax invoices should have been issued. The evidentiary burden was on the defendants to identify such considerations in the Trust's attack against the certificate of balance. Such considerations were not disclosed to the court.

<u>COSTS</u>

[46] The parties are effectively in agreement that it would be fair to award costs on a Magistrate's Court scale regard being had to the capital amount being claimed.

[47] Ms De Kock, further, reminds the court that in terms of the agreement between the parties the Trust accepted responsibility for all costs incurred by the plaintiff in any action against it, inclusive of attorney and own client costs.

[48] I am satisfied that the plaintiff has achieved substantial success in its claim and is, as such, entitled to its costs in accordance with the agreement between the parties.

ORDER

[49] In the result the following order is made against the Trust, as represented by the three defendants, and the third defendant in his personal capacity jointly and severally, the one paying, the other to be absolved:

49.1 Payment of R47 263,03;

49.2 Payment of interest on the above amount at the rate of 15,5% from the 1st July 2010 to date of final payment;

49.3 Attorney and own client costs on the basis of Magistrate's Court scale.

L. J. LEKALE, J

On behalf of plaintiff:	Adv D de Kock Instructed by: Matsepes Inc Aliwal Street BLOEMFONTEIN
On behalf of defendants:	Adv H J Benade Instructed by: Naudes BLOEMFONTEIN

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